

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 18, 2007

**STATE OF TENNESSEE v. BENJAMIN GREER**

**Direct Appeal from the Circuit Court for Rutherford County**  
**No. F-52294B James K. Clayton, Jr., Judge**

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**No. M2007-01284-CCA-R3-CD - Filed May 6, 2008**

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Defendant, Benjamin Greer, was convicted of three counts of aggravated burglary, received an effective sentence of six years, suspended, and was placed on probation. Following numerous violations by Defendant of the conditions of probation, the trial court revoked Defendant's probation after a hearing. Defendant appeals the trial court's revocation of his probation. After a thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J. C. McLIN, JJ., joined.

Gerald L. Melton, District Public Defender; Jeffrey S. Burton, Assistant Public Defender; and Russell N. Perkins, Assistant Public Defender, Murfreesboro, Tennessee, for the appellant, Benjamin Greer.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Trevor Lynch, Assistant District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

**I. Procedural Background**

Defendant was sentenced on December 17, 2002, to concurrent sentences of six years for each conviction of aggravated burglary and was placed on probation for six years. A warrant for violation of probation, as amended, was filed in April 2006, charging that Defendant (1) was arrested for driving under the influence on March 8, 2006, and that Defendant failed to report the arrest to his probation officer; (2) that Defendant admitted to his probation officer that he had illegally obtained and used the prescription drug Hydrocodone; (3) that Defendant failed to make the requisite payments for court costs and fees; (4) that Defendant's arrest for DUI placed the public at risk as

well as himself; and (5) that Defendant failed to report his change of residence to his probation officer.

## **II. Revocation Hearing**

Sean Patrick Michael Moore, with the Tennessee Board of Probation and Parole, supervised Defendant's probation. Mr. Moore testified that according to his files a warrant for violation of probation was issued on September 20, 2004, after Defendant tested positive for marijuana, amphetamine, and methamphetamine, and failed to pay court costs and fees. The warrant was amended on February 28, 2005, for failure to report to his probation officer and failure to meet his scheduled court dates. Defendant's probation was revoked on April 25, 2005, and he was ordered to spend sixty days in confinement, after which he was to be placed back on supervised probation. As a condition of his supervised probation, Defendant agreed to serve his sentence and waive application for a suspended sentence should he violate the terms and conditions of his probation in the future.

Mr. Moore prepared the instant affidavit of probation violation on March 29, 2006, alleging that Defendant had been arrested for DUI and had failed to report his arrest to his probation officer, that he had admitted on February 28, 2006, that he had illegally obtained and used the prescription drug Hydrocodone, and that he had failed to pay the requisite court costs and fees. Mr. Moore said that Defendant made a scheduled visit on April 7, 2006, after the affidavit was filed and at that time reported his DUI arrest. Mr. Moore said that he did not see Defendant again until November 30, 2006.

Mr. Moore said that he filed an addendum to the affidavit of probation violation on April 10, 2006, alleging that Defendant had failed to inform him that he had changed residences. Mr. Moore said that in November 2005, Defendant had listed a Tellico Plains address as his residence with an alternative address in Greenback. Defendant told Mr. Moore that he owned the Greenback land and intended to put a trailer on the property. Mr. Moore said that he visited the Tellico Plains address, and the owner of the residence told him that Defendant had never lived at that address. The owner of the residence in Greenback informed Mr. Moore that Defendant did not own the land, but that he had placed a mailbox by the side of the road. Mr. Moore said that he discovered that Defendant was actually living at the Hotel 411 in Maryville.

A warrant for Defendant's arrest for violation of probation was issued on May 8, 2006, and he was released on bond on November 22, 2006. Mr. Moore stated that Defendant was to report twice each month during his bond supervision. Defendant reported to Mr. Moore on November 30, 2006, and said that he was living with his mother in Macon County, but that he was looking for work in Monroe County. Defendant reported on December 7, 2006, and again on January 2, 2007. At the latter meeting, Defendant told Mr. Moore that he had been issued citations in Blount County for driving on a revoked license and for driving without insurance. Defendant refused to take a drug test because he knew he would fail. Mr. Moore said that Defendant did not report for any further scheduled meetings after January 2, 2007. Defendant missed a scheduled court date on January 22,

2007. He called Mr. Moore a few days later and said that he wanted to talk to Mr. Moore. Mr. Moore declined to speak with Defendant and informed him that he needed to contact the Rutherford County Sheriff's Department.

Mr. Moore testified that he explained to Defendant the importance of complying with the terms and conditions of probation. Defendant responded that "it was really not a big deal" when Mr. Moore attempted to explain the consequences of violating his probation. Defendant told Mr. Moore that he had violated his probation once before and that he believed he would not be required to spend any time in confinement if he violated the terms of his probation again.

Defendant testified on his own behalf. Defendant said that after a bench trial, he was found not guilty of the DUI charge in Blount County. Defendant acknowledged that he admitted to Mr. Moore on February 28, 2006 that he had illegally obtained and used the prescription drug Hydrocodone. Defendant said that he had been in an automobile accident in September 2005, and had broken some of his ribs. Defendant was originally prescribed Lortab for the pain, but the medicine was too strong. Defendant illegally obtained Hydrocodone to help with the pain because he could not "afford the medical."

Defendant acknowledged that he told Mr. Moore on one occasion that he could not pass a drug screen. Defendant admitted that he had not been able to make payments toward court costs and fees because he was incarcerated from May 2006 until November of that year. Defendant said that he and his girlfriend lived at the Tellico Plains address until her stepfather began residing there. Defendant then moved to Greenback where his girlfriend's family owned land. Defendant said that he intended to purchase a double wide trailer to put on two acres of the family's land, but the family got into an argument about the location of the acreage. Defendant said that he and his girlfriend moved to the Hotel 411 as a temporary arrangement.

Defendant said that he missed the January 22, 2007, court date because his car broke down. Defendant introduced as an exhibit an estimate from Cox Exhaust dated January 30, 2007, to repair the car.

Defendant acknowledged that he missed some scheduled appointments with his probation officer because of vehicle problems or because he was incarcerated. Defendant stated, however, that he always called to explain why he had not attended the meeting.

On cross-examination, Defendant acknowledged that he had "technically" violated the terms of his probation. Defendant said that he had not paid his court costs and fees because he had child support and a family to support.

At the conclusion of the revocation hearing, the trial court stated:

Well, [Defendant], I'm sorry that you didn't take it a little bit more seriously. You do have a lot of excuses. And I say they are excuses more than reasons. . . . And you

did come for a drug screen – or came in and were asked to submit to a drug screen and decided that you probably didn’t want to because you were going to fail it. And I don’t know whether the Hydrocodone that you were taking would have – how that would have shown up on the drug screen. It probably would have shown up as hydrocodone or at least opiates or something of that nature as opposed to T.H.C. or cocaine or methamphetamine or any of those things. . . . I don’t know why people – probation is not that impossibly hard. All I ask people to do is to report to probation officers. It’s amazing to me how people can get put in jail and use the telephone and call out. I think they give them, what, once a day or once a week to let them call out? . . . It may be available every day. And then they can call everybody but their probation officer and tell them where they are. That just doesn’t make sense to me. But I do find that you violated your probation. I do find that you agreed if you did violate again, that you would serve your sentence. And, therefore, that’s what my ruling will be.

### III. Analysis

On appeal, Defendant contends that the trial court’s decision to revoke his probation was arbitrary. Defendant argues that the trial court based its ruling on Defendant’s prior agreement to serve the balance of his sentence in confinement if he further violated his probation, and not on the facts and circumstances surrounding the allegations set forth in the current warrants for violation of probation. The State contends that the trial court acted properly in revoking Defendant’s probation because Defendant admitted he had violated the terms of his probation.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the defendant has violated a condition of probation. T.C.A. §§ 40-35-310, -311. The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation is subject to an abuse of discretion standard of review, rather than a *de novo* standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). Discretion is abused only if the record contains no substantial evidence to support the trial court’s conclusion that a violation of probation or Community Corrections sentence has occurred. *Id.*; *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Proof of a violation need not be established beyond a reasonable doubt, and the evidence need only show that the trial judge exercised a conscientious and intelligent judgment, rather than acted arbitrarily. *Gregory*, 946 S.W.2d at 832; *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

To revoke a sentence of probation, a trial court must find by a preponderance of the evidence that the defendant violated the terms of his probation. Here, Defendant admitted that he violated the terms of his probation by illegally obtaining and using the prescription drug Hydrocodone. Further, Defendant admitted that he was behind in the payment of his court costs and fees. This alone is substantial evidence to support the trial court’s revocation order. *State v. Eric L. Abell*, No. M2006-01981-CCA-R3-CD (Tenn. Crim. App., at Nashville, July 23, 2007), *no perm. to appeal filed*; *State*

*v. Roger Allen*, No. E2005-01388-CCA-R3-CD, 2006 WL 721305 (Tenn. Crim. App., at Knoxville, Mar. 22, 2006), *no perm. to appeal filed*; *State v. Eric D. Devaney*, No. E2005-01986-CCA-R3-CD, 2006 WL 2372469 (Tenn. Crim. App., at Knoxville, Aug. 17, 2006), *no perm. to appeal filed*. Based on the foregoing, we conclude that the trial court did not abuse its discretion in revoking Defendant's probation and ordering him to serve the balance of his sentence in confinement.

### **CONCLUSION**

After review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE